refused appellees' instructions A, B, and C, and given appellant's instructions Nos. 1, 2, and 3.

The refusal of the court to give certain instructions asked by appellant, predicated upon the agency of Elam for the sale of Robertson's stock in question, and submitting that question of fact to the jury, is assigned as error. But in the view we have taken of the case it is unnecessary to consider this assignment. Nor do we consider it expedient to express an opinion as to the weight of the evidence certified in the record, as the case, because of misdirection of the jury and the admission of improper evidence has to be remanded for a new trial of the issue out of chancery, should the court deem it proper to submit again the issue to a jury.

The decree appealed from is reversed and annulled, and the cause remanded to be further proceeded with, in accordance with the views expressed in this opinion.

Note.

The decision in this case, that a sealed instrument is conclusively presumed to be for a valuable consideration, is undeniable in so far as it applies to actions at law, but this was a suit in equity for specific performance, and in a well-considered West Virginia case, for the enforcement in equity of an executory lease, the court uses the following language: "The fourth contention of the plaintiff is that its lease is not a nudum pactum, without consideration, and void by reason thereof. It insists that it is made under seal, which imports consideration, and that a party to it cannot avoid it, for this reason. This would be true at law. 3 Am. & Eng. Ency. Law, 827; Harris *v.* Harris, 23 Gratt. 738. It is not true in equity. "It is a fundamental principle of equity to refuse aid to the enforcement of executory deeds, unless founded upon either a good or a valuable consideration. The presence of a seal does not, in equity, import a consideration." It has no force. 6 Am. & Eng. Ency. Law (2d Ed.) 683." Eclipse Oil Co. *v.* South Penn Oil Co., 47 W. Va. 84, 34 S. E. 923.

And this decision cannot be "ascribed to the fact that the ancient rule of the common law, that a seal conclusively imports a consideration, has been repealed or modified by statute" in West Virginia, for no such statute, as far as we know, exists in that state.

DULANEY'S ADM'R *v.* DULANEY.

June 14, 1906.

[54 S. E. 40.]

1. Equity—Subjects of Jurisdiction—Construction of Written Instrument.—Where, under an antenuptial contract giving the wife the interest on a certain sum in lieu of dower, she paid the taxes on the sum named out of the interest, a bill seeking, not only to recover

the amount paid, but also to have the contract construed to determine her rights in the future, is not demurrable.

2. **Husband and Wife—Antenuptial Contract—Construction.**—Under an antenuptial contract providing that the wife should receive, in lieu of dower for each year she might survive her husband, the interest on a certain sum, the taxes on the sum named must be paid out of the interest.

Appeal from Circuit Court, Greene County.

Suit by Mary F. Dulaney against the administrator of John G. Dulaney. From a decree in favor of complainant, defendant appeals. Reversed, and bill of complaint dismissed.

John S. Chapman, for appellant.
Geo. Perkins, for appellee.

CARDWELL, J. On the 25th day of December, 1871, John G. Dulaney and Miss Mary F. Melone, in contemplation of marriage, entered into a written contract, thereafter duly recorded in the clerk's office of Greene county court, whereby it was provided that the latter, in lieu of dower, should have, for and during each and every year that she might survive the former, "the interest on the sum of thirty-five hundred dollars ($3,500.00), part of his [Dulaney's] estate, to be paid to her annually by his [the said Dulaney's] executor, administrator, or other lawful representative," and, further, that neither party to the contract should be in any way liable for the debts of the other, etc.

A few days after the date of the contract, the intended marriage was consummated, and the parties lived together as man and wife until the death of Dulaney, intestate, in July, 1888. Shortly after his death a chancery suit was instituted in the circuit court of Greene county to settle and distribute his estate. To this suit Mrs. Dulaney, the widow, was a party defendant, represented by counsel, and under an order of the court therein, J. F. Dulaney, as administrator, invested or loaned out the sum of $3,500 as a part of his intestate's estate, and the interest on the same at the rate of 6 per cent. per annum has been regularly paid to Mrs. Dulaney each year; she paying the annual taxes on the principal sum from the year 1889 down to and including the year 1904.

In June, 1905, Mrs. Dulaney filed her bill in this cause against J. F. Dulaney, as administrator, as aforesaid, the object of which was to have returned to her the taxes she had paid on the $3,500, amounting in the aggregate to $612.15, on the ground that the provision made for her in her marriage contract is an annuity equal to the legal interest (6 per cent.) on $3,500—i. e., $210 per annum—and not an income of the interest on the principal sum. She invokes relief in a court of equity upon two

grounds: First, to have corrected a mutual mistake of fact, by which she was misled to pay the taxes on the $3,500 for 16 years; and, second, because her remedy in a suit at law to recover back from the estate of her late husband the amount of these taxes would not be complete and adequate. Her bill avers that she had no occasion to hear anything as to taxes until the year 1889, and that "then she was told by J. F. Dulaney, administrator of Jno. G. Dulaney, deceased, that she must pay the taxes on the $3,500, and not only so, but the administrator told her that the judge had decided the question—that he had asked the judge in the courthouse who should pay the taxes on this fund, and the judge said the complainant must pay them," etc. The special prayer of this bill is "that the mistake under which the taxes on this fund ($3,500) have been paid by complainant may be corrected; that the amount paid by her, viz., $612.15, with interest thereon from the 25th of April, 1905, may be paid to her by the said administrator; that for the future and during the remainder of the life of the complainant the said administrator may be required to pay the annual tax on said fund, and to pay her annually, free of all charges and deductions the sum of $210, that being the measure of her rights under the contract aforesaid."

Upon the hearing of the cause on the bill and the exhibits therewith, the demurrer, and answer of the defendant thereto, the circuit court being of opinion "that the complainant was entitled to have returned to her the taxes she had paid on the $3,500, with interest thereon from April 25, 1905, until paid, that being the date at which the defendant was requested to refund and refused," decreed that the complainant recover of the defendant the sum of $612.15, with interest thereon from the 25th day of April, 1905, till paid and her costs, to be levied of the goods and chattels of his intestate in his hands, if so much he has, and, if not, then of his own proper goods, and "that for the future and during the life of the complainant, the administrator shall pay to her annually the sum of $210, without diminution for taxes or any other charge," etc. From that decree the case is before us upon an appeal granted the defendant.

We are of opinion that, as the bill calls for not only a construction of the marriage contract of December 25, 1871, the recovery of the taxes on the $3,500 invested for her benefit, alleged to have been paid by the complainant under a mutual mistake of fact, but to have her rights under the contract in the future during the remainder of her life fixed and determined, the demurrer to the bill was properly overruled. Stuart *v.* Pennis, 91 Va. 692, 22 S. E. 509; So. Ry. Co. *v.* Franklin, etc., R. Co., 96 Va. 704, 32 S. E. 485, 44 L. R. A. 297.

The sole question arising on the merits of the case requiring consideration is, whether the provision made for appellee in the

marriage contract of December 25, 1871, vested in her, upon the death of her husband, an annuity for her life of the interest on $3,500 or an income of the annual interest on that sum? If the latter, as the authorities agree, she is liable for the taxes assessed against the principal sum; and if the former, she is not.

It is provided in the contract, as already stated, that appellee should have, in lieu of her dower, during each and every year that she survived her husband, "the interest on the sum of thirty-five hundred dollars ($3,500), part of his [Dulaney's] estate, to be paid her annually by his [the said Dulaney's] executor, administrator, or other lawful representative." "Interest on $3,500," is to be taken as meaning legal interest, 6 per cent., which is $210 per annum, and the parties to the contract are to be considered as having understood and contemplated that the principal sum of $3,500 would be liable to taxation annually during the life of appellee, if she survived her husband. The simple question, therefore, is, who under the law as applied to the facts of this case should pay these taxes?

"An annuity, in its strict sense, is a yearly payment of a certain sum of money, granted to another in fee, or for life, or for years, and chargeable only on the person of a grantor." 2 Cyc. 459; 2 Minor's Inst. p. 31.

"The word 'income' means the gain which proceeds from property, labor or business. When applied to a sum of money, or money in the public debt, it is equivalent to 'interest.'" Sims' Appeal, 44 Pa. 345. In that case a bequest of "the income of $5,000, to be paid to the legatee during life by testatrix's executors, out of an adequate fund to be retained therefor," was held to be a bequest of the annual proceeds or interest of that sum of money ($5,000), and not an annuity of that amount. The citation of the case is merely to show that the court considered that the words "income" and "interest" are the equivalent of each other, and as ordinarily used mean one and the same thing. See also, 16 A. & E. Enc. L. 147, and note, p. 149.

In 2 Redfield on L. of Wills (3d Ed.) 133, it is said: "It seems to be well settled in the American courts that as a general thing the bequest of the interest of a particular sum will not be construed the same as giving an annuity of the same amount, although payable annually, but it will be regarded simply as the gift of the income or interest of that amount."

"But in one case," says the same author, "it was considered that the bequest of the interest of a certain sum, not setting apart any fund for the payment of the same, was a gift of an annuity equal to the interest upon the sum named, at the rate fixed by law, and that it was not chargeable with any tax or deduction on account of the services of the executor in the man-

agement of the same." Brimblecom *v.* Haven, 12 Cush. (Mass.) 511.

The case cited is relied on by appellee here, and is authority for her contention, but it is in conflict with the statement of the law just quoted and a number of decisions by other courts taking the opposite view.

In Whitson *v.* Whitson, 53 N. Y. 479, a testator bequeathed to his wife the life use of $10,000, directing his executors to pay her the lawful interest on said sum semiannually, and after her decease said sum to any heirs his wife should have by him; if none, then to his son, O., with the residue and remainder of the estate. The executors, having paid the taxes on the principal sum of $10,000 out of the interest thereon received by them, paid the balance of the interest to the widow of the testator. On the final accounting she claimed the whole of the interest, without any deduction for taxes or commission. The surrogate sustained that claim, and ordered the executors to pay her the sum of $745, being the amount theretofore deducted by them from the interest for taxes and commissions, and thereafter to pay to her annually the sum of $700 (legal interest on $10,000 for one year), without any deduction therefrom for taxes or commissions, which order was affirmed by the Supreme Court; but on appeal to the court of Appeals of New York it was reversed and annulled, the court holding "that the bequest was of the income of the sum specified, not an annuity of $700, and that the taxes and expenses of the trust should be paid out of such income, and not out of the estate." The opinion, after referring to the fact that the testator gave other legacies, says: "The direction to his executors to pay her [the widow] the lawful interest of the said sum of $10,000 semiannually is entirely consistent with an intention to give her the income thereof. The testator directed his executors to make investments for the purpose of paying his legacies. He doubtless thought that the $10,000 could be invested at law interest, payable semiannually, and this interest he directed so to be paid to his wife. That the fund invested would be subject to taxation was not probably thought of by him. Had it been, and had he designed that the taxes should not be paid from the interest, he would have so declared. Not having done so, the law provides that they shall be paid from the income"—citing Red. on L. of W., supra.

In Pearson *v.* Chace, 10 R. I. 455, the testator bequeathed to his wife, during her natural life or widowhood, and in lieu of dower, the dividends and income of certain shares of bank stock, the reversionary right being in his three daughters, who were also made his residuary legatees, etc. Held, "that the gift was one of income and not an annuity, and that O. [the widow] was, therefore, liable to pay the taxes upon the stock, so long as she

received the income from it." It is true the will in that case uses the word "income"; but a gift of an annuity for life and a gift of the income of certain property for life are defined and distinguished, the opinion plainly treating the terms "income" and "interest" as synonymous.

In Booth *v.* Ammerman, 4 Bradf. (N. Y.) 129, a bequest of the interest on a certain sum was held to be a bequest of income and not an annuity.

The case of Brimblecom *v.* Haven, supra, so much relied on for appellee, and which cited only the case of Sweet *v.* Boston, 18 Pick. (Mass.) 123, in support of the conclusion reached, is, we think, materially different from the case at bar. There, in furtherance of the purpose of the testator to make ample provision for his wife if she survived him, the bequest was simply of the interest on $6,000 along with other property for life, not setting apart any fund for its payment or to produce an income in the way of interest; while here the marriage contract is that the intended wife (appellee) of Jno. G. Dulaney, in the event that she survived him, should have, in lieu of dower in his estate, "the interest on $3,500, part of his [Dulaney's] estate, to be paid to her annually by his [the said Dulaney's] executor, administrator, or other lawful representative." Clearly it is to be assumed that the parties understood and expected that this principal sum was to be set apart from the residue of Jno. G. Dulaney's estate to yield and produce the provision made for the wife in lieu of dower, which she agreed to accept, and to leave what remained of Dulaney's estate to be disposed of as he might by will or otherwise see fit, or to pass to his heirs at law or distributees in case he died intestate, free from any claim to or interest in it that appellee might have had but for her marriage contract. It could not reasonably be supposed that it was the purpose or expectation of the parties that the estate of Dulaney, or any part of it other than the $3,500 was to be withheld from distribution among his heirs and distributees after his death leaving appellee surviving him, in order to provide a source from which the taxes on the $3,500 could be paid annually so long as appellee might live; yet such would have been necessarily the result as to a part at least of Dulaney's estate, other than the $3,500, if the marriage contract, in fact, stipulated for an annuity to appellee equal to the legal interest on $3,500, and not an income of the annual interest on that sum; for, without reserving a part of the estate out of which the tax on the $3,500 could be paid, it could not be paid by the administrator except out of the principal sum, thereby reducing that sum each year by the amount of the taxes thereon, rendering it less and less capable year by year of yielding an annual interest or income equal to lawful interest for one year on $3,500, viz., $210. It was just

such considerations as these that the Supreme Court of Rhode Island, in Pearson *v.* Chace, supra, considered all-sufficient to justify the conclusion that where a testator bequeathed to his wife during her natural life or widowhood, and in lieu of dower in his estate, the dividends and income of certain shares of bank stock, he intended the gift as an income, and not an annuity, the annual taxes on the stock to be paid by the donee out of the "dividends or income" thereon, and not out of the testator's estate.

And the same considerations were regarded as of the greatest importance by the Court of Appeals of New York in Whitson *v.* Whitson, supra, where, as we have seen, it was held that the widow of a testator to whom her husband had bequeathed the life use of $10,000, his executors "to pay her the lawful interest of the said sum semiannually," was liable for the annual taxes on the principal sum, and not the testator's estate.

The sole question decided in Sweet *v.* Boston, supra, was whether the interest on $50,000 bequeathed by a testator to his daughter for life was liable for taxes under a statute imposing a tax on incomes derived "from any profession, handicrafts, trade, or employment, organized by trading at sea or on land," the court holding that it was not, and that by the statute the interest on the $50,000 was not liable to be taxed to the daughter in any form.

In this case appellee acquiesced for 16 years in the view that she should pay, and did pay, the annual taxes on the $3,500, and although she resided all the while near to the courthouse of the court in which the suit for the settlement of her husband's estate, to which she was a party, was pending, and in which the $3,500 was ordered to be invested by the administrator of her deceased husband, in pursuance of the marriage contract upon which she is relying, she made no protest against the payment of these taxes until the estate of her late husband had been distributed, until all of his children were dead, except appellant, and until the bulk of his real estate had been sold and transferred into the hands of innocent purchasers. She, in her bill, acquits appellant of bad faith in telling her in 1889 that the judge had said that she should pay the taxes on the $3,500, and does not deny the averments of his answers just repeated, but simply claims that under the law the taxes on the principal on which she has been receiving the interest are not chargeable to her.

Had the marriage contract in question never been made, and dower had been assigned to appellee in her husband's estate, clearly the law would have imposed the duty on her of paying the taxes upon the property so assigned, in order to preserve it for the benefit of those to have it when her right to its enjoyment terminated. In lieu of dower appellee was by her contract

to have the interest on $3,500, to be paid to her annually during her life, if she survived her husband, which principal sum, "a part of Dulaney's estate," was, by implication, to be invested at his death by his personal representative to earn interest; there being nothing in the contract from which it can be deduced that the parties thereto intended that the general rule, requiring one holding or enjoying property as dower, or in lieu of dower, must pay the taxes thereon, should not apply, but that the taxes on the $3,500 was to be paid out of the residue of Dulaney's estate.

We are of opinion that the law imposed on appellee the duty of paying the annual taxes upon the $3,500 from and after the time the same was invested under the order of the court in the said chancery cause of Kinsey *v.* Dulaney, pursuant to her marriage contract, so long as she receives the annual interest it earns, and that she has rightly paid the taxes thereon heretofore. Therefore the decree under review will be reversed and annulled, and this court will enter the decree that the circuit court should have entered, dismissing appellee's bill, with costs to appellant.

Note.

The ruling of the court in this case is eminently satisfactory. The point to be decided was not without difficulty, but it is dismissed by the court with unusual brevity and clearness. The question to be decided was whether the provision for the wife in the antenuptial contract was an annuity or an income, and the court in deciding it to be the latter was, in our opinion, clearly right.

The supreme court of New York, in deciding that there was no difference in principle between the gift of an annuity and the gift of income, with respect to the time when each accrues, added: "It is true that an annuity usually consists of a gross sum, payable in any event, while income must depend upon the earnings of the estate, or some part of it, after deducting lawful charges and commissions, and, of course, if not earned, cannot be paid. But this is a contingency which affects, not the quality of the gift, but its amount, and the certainty of payment." In re Stanfield, 135 N. Y. 292, 31 N. E. 1013.

In Bartlett *v.* Slater, 53 Conn. 102, 22 Atl. 678, the will bequeathed the sum of ten thousand dollars to the testator's son-in-law, the plaintiff in this suit, in trust to pay the income arising therefrom, or such portion thereof as he, the trustee, might consider best, to the testator's granddaughter, during her natural life. It was held that this was not an annuity. The court said: "This bequest grants discretionary power to the trustee to pay the beneficiary such portion of the income as he may consider best. He may pay over the whole, or any portion thereof, or none at all, according to his discretion. The time of payment, too, is left wholly to the discretion of the trustee. The bequest has but few of the elements of an annuity, which is 'a yearly payment of a certain sum of money granted to another in fee, or for life, or for a term of years, charging the person of the grantor only.' 2 Williams, Ex'rs, 809."

"Income" embraces only the net profits after deducting all necessary expenses and charges. "Annuity" is a fixed amount, directed to be paid absolutely and without contingency. Carr *v.* Bennett, (N. Y.) 3 Dem. Sur. 433; Ex parte McComb, (N. Y.) 4 Bradf. Sur. 151.